IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

AMERICAN FINANCIAL SERVICES ASSOCIATION, et al.,	*	
Plaintiffs,	*	
vs.		Civil Action No. 269105
MONTGOMERY COUNTY, MARYLAND,	*	
Defendant.	*	

OPINION AND ORDER

This matter comes before the Court on the Plaintiffs' Verified Second Amended Complaint for Declaratory and Injunctive Relief and the Defendant's Answer thereto. Following a trial on July 6, 2006, the Court took the matter under advisement to consider the evidence and arguments presented. For reasons set forth hereinafter and with apologies for the delay, the Court shall permanently enjoin Montgomery County from enforcing Montgomery County Code Chapter 27 as amended by Bill No. 36-04 (the "Bill"), and further declare that the Bill is beyond the power of the County to enact because it is not a local law.

PROCEDURE

Plaintiffs herein filed suit on February 10, 2006. In addition to seeking declaratory and permanent injunctive relief, Plaintiffs sought a preliminary injunction to temporarily enjoin the County from enforcing Bill 36-04. Following a hearing on March 7, 2006, the Court granted the Plaintiffs' request to enjoin enforcement of the Bill pending a trial before the Court on July 6, 2006.

On June 2, 2006, Plaintiffs filed a trial brief setting forth their arguments in support of their Complaint. On June 15, 2006, Defendant Montgomery County filed a motion for summary judgment. Because the trial date was so near and by agreement had been limited to a one and a half hour Court trial, the Court declined to consider the motion for summary judgment. Instead, the Court treated the motion as the Defendant's trial brief. The County also filed a motion in limine to preclude the admission of certain evidence. They argued that because the Plaintiffs were mounting a facial attack on Bill 36-04, no evidence was necessary or relevant. As well, they argued that certain items of evidence which the Plaintiffs sought to introduce constituted hearsay or were otherwise inadmissible.

The morning of trial, counsel for both parties announced that to resolve the motion in limine they had entered into a "STIPULATION OF EVIDENCE" (Plaintiffs' Ex. 1) subject only to four objections. First, the County objected to the Plaintiffs introducing any evidence of the effort by some members of the County Council to repeal the Bill by introducing Bill 4-06 and the legislative history relating thereto. For reasons set forth on the record, the Court sustained the County's objection to the admissibility of that evidence. Second, as part of the legislative history of Bill 4-06, the Plaintiffs sought to introduce the transcript of a hearing that took place before the County Council on April 25, 2006. An exhibit was introduced at that hearing which consisted of a list of lenders who declared they would no longer do business in Montgomery County if Bill 36-04 passed. The Court sustained the County's objection to the introduction of that evidence.

The County's third objection was to the transcript of the March 7, 2006 hearing before the Court on the preliminary injunction. The objection was on grounds of relevance. In addition, the County sought to adopt all objections they had made when evidence was

originally offered. The Court overruled the County's objection based on relevance and agreed to receive the transcript subject to their right to renew any objection they had made at the earlier hearing on other grounds. During the course of the trial, the County did not renew any of its earlier objections. Accordingly, the transcript is received in its entirety. (Plaintiffs' Ex. 2).

The Defendant's final objection related to an Opinion issued by the United States Office of Thrift Supervision. Upon review, that office had determined that Bill 36-04 was preempted by Federal law. The Plaintiffs argued that the Court should consider the Opinion as persuasive but non-binding authority and give it such weight as the Court felt appropriate. The County argued that the Opinion was irrelevant because the Plaintiffs were not asserting any argument before this Court that Bill 36-04 was preempted by Federal law. Over the Defendant's objection, the Court agreed to receive the evidence. Upon a full consideration of the arguments of the parties, the Court has determined that the Opinion for purposes of the issues now before the Court is not entitled to any weight.

ISSUES

The Plaintiffs argue that the Court must declare Bill 36-04 null and void and permanently enjoin its enforcement for four reasons:

1. Bill 36-04 is a general law and, therefore, beyond the authority of the County to enact.

2. The State has preempted the authority of the County to enact legislation affecting lending such as Bill 36-04.

3. Bill 36-04 is impermissibly vague and therefore violates the Plaintiffs' right to due process.

4. The objectionable portions of Bill 36-04 are not severable and the Bill must be struck down as a whole.

Montgomery County responds that each of the Plaintiffs' arguments is flawed and is premised on a misstatement of the facts and/or applicable law. They ask the Court to hold that Bill 36-04 represents a valid exercise of the County's authority.

For reasons set out in detail in the County's Motion for Summary Judgment, the Court holds that the County's authority to enact the Bill has not been preempted by the State and the Bill is not impermissibly vague. The Court also notes that the Plaintiffs' preemption argument flows in part from the flawed assumption that the application of the "disparate impact"[1] analysis to a claimed violation of the Bill would shift the burden of proof to a defendant. At most, that doctrine imposes a burden on a defendant of producing a neutral or non-discriminatory reason for their action. Upon that showing, the burden of proof would remain on the plaintiff. Nevertheless, for reasons described hereafter, the Court agrees that Bill 36-04 is not a local law and its objectionable provisions cannot be severed. Therefore, the Court shall declare the Bill unconstitutional and permanently enjoin its enforcement.

[1] Under the disparate impact analysis, once the plaintiff meets their burden of establishing a prima facie case of discrimination, the burden shifts to the defendant "to articulate some legitimate, non-discriminatory reason for" their action. Where the defendant articulates such a reason, the burden of proof remains on the plaintiff to prove the articulated reason was merely a pretext, or a cover up for a discriminatory decision. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

FACTS

There is little or no dispute of material facts in this case. For purposes of this Opinion and Order, the Court substantially adopts the statement of facts as set forth in the Defendant's Motion for Summary Judgment.

On November 29, 2005, the Montgomery County Council passed Bill 36-04. The Bill was signed into law by the County Executive on December 7, 2005. The Bill's effective date is March 8, 2006.

The Bill seeks to amend certain portions of Chapter 27 of the Montgomery County Code entitled "Human Rights and Civil Liberties." Section 27-1 sets forth a statement of policy; §§ 27-2 through 27-5 establishes the Commission on and Office of Human Rights, its duties and makeup. Section 27-6 sets forth certain definitions. Section 27-7 concerns the administration and enforcement of the Chapter. Section 27-8 sets out the penalties and relief for violation of the Chapter. Section 27-9 concerns the institution of civil actions in court for violations.

The remaining sections of Chapter 27 address matters of discrimination in four different ways: public accommodations, real estate, employment, and through intimidation. Discrimination in real estate is covered in §§ 27-12 through 27-18. That section is further divided into: Discrimination in Housing (§§ 27-12 through 27-15) and Discrimination in Commercial Real Estate (§§ 27-16 through 27-18). We are concerned here with Discrimination in Housing.

Prior to the enactment of Bill 36-04, § 27-12(b) prohibited a "lending institution" from engaging in discrimination while conducting certain enumerated activities. Bill 36-04 amends § 27-12 (b) substituting "person" for "lending institution", adding "brokering money" to

"lending money", and "servicing or purchasing" loans to "guaranteeing" loans. In addition, without limiting the application of § 12 (b), the Bill adds new subsection (c) which identifies certain specific activities that a person is prohibited from engaging in based upon another's membership in a protected class. One of those activities is "steering,"[2] another is making available a mortgage loan which:

> "(A) includes the financing of single premium credit life insurance;
> (B) provides for excessive upfront points, excessive fees, or excessive pre-payment penalties; or
> (C) provides compensation paid directly or indirectly to a person from any source."

In addition to amending § 27-12 (b), the Bill amends § 27-8 by increasing the maximum amount of damages a case review board may award for "humiliation and embarrassment" from $5,000 to $500,000. As well, it adds a new category of compensable damages, "financial losses resulting from the discriminatory act." Section 27-8 (a) (1) (F). While the Bill amends certain other provisions of Chapter 27, the above are those upon which the Plaintiffs mount their challenge.

The purpose of Bill 36-04 is described in Section 1:

> **Section 1 – Findings and Purpose.**
>
> Studies show that discriminatory lending practices have increased in the last few years and that some lenders aggressively market high cost home loans with exorbitant and unnecessary fees and engage in other unfair credit practices that strip families of the equity in their homes.

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[2] Steering is defined as:

(A) restricting or attempting to restrict a person's choices because of factors other than a person's income or credit level in connection with seeking, negotiating, buying, or renting a dwelling, including seeking a mortgage loan for a dwelling;

(B) discouraging a person from a particular mortgage loan with more favorable terms if the person may qualify for that particular mortgage loan;

(C) directing a person away from a housing or mortgage loan product, program, or service with more favorable terms if the person may qualify for that particular product, program, or service; or

(D) offering less favorable mortgage loan terms than would otherwise be offered.

Montgomery County Code, Chapter 27, § (12)(c)(1).

Discriminatory lending practices impair the economic strength of County homeowners, families and neighborhoods.

It is the intent of the County Council to prevent discriminatory lending practices directed at households because of their race, color, religious creed, ancestry, national origin, sex, marital status, disability, presence of children, family responsibilities, source of income, sexual orientation or age. Some indicators of discriminatory lending practices include, but are not limited to:

(1) marketing or refinancing mortages that a borrower cannot afford to repay based upon income and credit levels;

(2) charging abusive prepayment penalties;

(3) financing excessive points and fees;

(4) steering a borrower to a more expensive mortgage by any of the following activities: discouraging a person from a mortgage loan with more favorable terms; directing a person away from a housing or mortgage loan product, program, or service with more favorable terms; offering more limited mortgage loan opportunities or less favorable mortgage loan terms; or delaying a mortgage loan application or approval; and

(5) financing single premium credit insurance.

In the County, studies have shown that subprime mortgages[3] are disproportionately offered to and entered into by minority homeowners. Although not all subprime loans are the product of discriminatory lending practices, studies demonstrate that a substantial percentage of people with subprime loans could qualify for loans with more favorable terms. The purpose of this legislation is not to restrict the subprime lending market, but to identify and regulate mechanisms, policies or terms that discriminate against the protected classes of individuals.

Plaintiffs' Ex. 1, Ap. 1 p 2, 3.[4]

[3] While there is apparently no accepted definition of the subprime market, subprime mortgages "… tend to be in smaller amounts, and with faster prepayments and significantly higher interest rates and fees, than 'prime' mortgages." *American Financial Services Assoc. vs. City of Oakland*, 34 Cal.4th 1239, 104 P.3d 813, 815 (2005).

[4] There are eight exhibits appended to the STIPULATION OF EVIDENCE. To avoid confusion, the Court shall refer to those exhibits as appendixes (Ap.).

The Bill was enacted at the Council meeting of November 29, 2005. The transcript of the meeting provides additional insight into the purposes of the legislation. The Bill's sponsors were Council members Perez, Subin and Floreen. In explaining why he had introduced the legislation, Council President Perez made reference to a chart he had prepared. The left side of the chart showed a map of Montgomery County disaggregated by race. The right side showed the concentration of subprime loans in the various areas of the County. Viewed together, the chart demonstrated in Council President Perez's view that "disproportionately African-Americans and Latinos are in the subprime market." (Plaintiffs' Ex. 1, Ap. 2, p. 7). Council President Perez further opined that

> Discriminatory lenders and predatory lenders have found a beach head in the subprime market, and that is the problem that we are seeking to address. We are seeking to address the problem by making the County government a real player in the battle to combat lending discrimination. Right now, you have a two legged stool of federal and state government guarding our civil rights. Frankly, that sends a chill up and down my spine …. And so the essence of this bill was to create a structure in which the County government, in particular our Office for Human Rights, would be an equal player in the battle to combat lending discrimination. No more power than state or federal authorities, but no less power.
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> (Plaintiffs' Ex. 1, Ap. 2, p. 8).

There was much discussion at the hearing concerning whether the County Council should explicitly state within the amendment that they were adopting and approving the use of the "disparate impact" analysis as a way in which a plaintiff could prove discrimination. It was the consensus of the Council members that the theory was currently available to plaintiffs in Montgomery County making claims of discrimination under Montgomery County Code Chapter 27.[5] Ultimately, the Council determined not to include such language in the Bill for

[5] This position was and is adopted by counsel for the Defendant at the hearing on the preliminary injunction and at trial.

fear that in doing so they might create questions about whether the theory was applicable to other legislation concerning discrimination. Instead, they directed their staff to consider drafting separate legislation to make it clear that the theory applied to all claims of discrimination.

At the hearing on the preliminary injunction on March 7, 2006, the Plaintiff presented testimony from two witnesses, Lawrence Pendleton and John Councilman. Mr. Pendleton is a mortgage broker whose offices are located in Olney, Maryland, Montgomery County. He is the President and owner of the Legend Mortgage Corporation, one of the Plaintiffs. He has been in the mortgage business for approximately 20 years. He is also President of the Maryland Association of Mortgage Brokers. As a broker, he seeks out loans from third parties for people purchasing homes or refinancing existing loans. In effect, he operates as a middle man between the borrower and the lender. Because of his concerns about the Bill, if it becomes law, his company, Legend Mortgage Corporation, will cease doing business in Montgomery County. This includes offering loans to residents of other counties on properties located in Montgomery County as well as offering loans to residents of the County on property located elsewhere.

John Councilman, President of AMC Mortgage Corporation, also testified. He has been in the mortgage business for approximately 21 years. His company which is located in Harford County operates in all 23 counties of Maryland. Only 2 to 5 percent of his company's business takes place in Montgomery County, Maryland. He testified that if the Bill becomes law, his company will also cease doing business in Montgomery County, Maryland. Because of his uncertainty about which activities the Bill prohibits, he feels it would be too dangerous to conduct brokerage business in the County.

ANALYSIS

Initially, the Defendant Montgomery County asserts that the lead Plaintiff, American Financial Services Association (AFSA), does not have standing to sue and should be dismissed. Given the nature of the relief sought and because the Court concludes that many of the remaining Plaintiffs do have standing, the Court finds that it is unnecessary to reach this issue.

General Versus Local Laws

Plaintiffs assert Bill 36-04 is a "general law" and the County Council lacks authority to enact such legislation. Therefore, the Bill is unconstitutional and must be struck down. The County agrees the Council is without authority to enact a "general law", but insists the Bill is a "local", not general, law. As such, the Bill is within the authority of the Council to enact.

The principal thrust of the Plaintiffs' argument is that the Bill is a general law because of its obvious extraterritorial impact. Citing *Holiday Universal, Inc. v. Montgomery County,* 377 Md. 305, 318 (2003), they argue "A local law is one that is confined in substance and subject matter to the prescribed territorial limits of the locality; by contrast, a law that deals with matters of general public welfare that are of significant interest to more than one geographic subdivision, or to the entire state, is a general law, and therefore, is beyond the power of the individual counties." (Plaintiffs' Trial Brief, p. 17).

A close reading of *Holiday*, however, suggests that Plaintiffs over-simplify the holding of the Court in that case. The Court in *Holiday* was called upon to decide whether Bill 22-92, enacted by the Montgomery County Council in order to amend the Consumer Protection Laws

Chapter (CPLC) of the Montgomery County Code, was a "local" or a "general" law. Bill 22-92 sought to add § 11-4A to the CPLC making it "unlawful for a merchant to engage in an unfair trade practice in the offering or sale of a future services contract." The ordinance applied to **all contracts signed** in Montgomery County as well as for services **primarily** to be provided in the County. § 11-4A(b)(1)(c). Prior to enactment of the amendment, membership contracts for most of the County's health clubs prohibited the member from cancelling the contract prior to the expiration date. The amendment declared the inclusion of such a term in a future services contract an unfair trade practice. § 11-4A(c). For that and other reasons, the Plaintiffs sought to enjoin enforcement of the ordinance.

The Court began its analysis by noting that "Montgomery County was a Charter Home Rule county under Article XI-A of the Maryland Constitution." *Holiday*, at 313. Section 2 of Article XI-A, referred to as the Home Rule Amendment, directed the General Assembly to provide a grant of express powers to charter home rule counties. The grant was later codified as Art. 25A Annotated Code of Md. (1957, 1987 Repl. Vol.), the Express Powers Act. Decisions of the Court of Appeals following enactment of the Express Powers Act make clear that the power of the Charter Home Rule counties is significant but not absolute. Their authority to enact laws is limited in two significant ways; first, to matters covered by the Express Powers Act, and second, to enacting only "local laws." Article XI-A § 3 of the Maryland Constitution. "Section 4 of Article XI-A explicitly states that '(a)ny law so drawn as to apply to two or more of the geographical subdivisions of this State shall not be deemed a Local Law, within the meaning of the Home Rule Amendment.' " *Holiday*, at 314. "Local Law" is not otherwise defined within Article XI-A. Instead, its interpretation has been left to the courts.

The *Holiday* Court first considered whether § 11-4A had any extraterritorial impact.

> By its own language, the ordinance makes clear that it would apply to a contract signed outside of Montgomery County, by parties residing outside of Montgomery County, where as much as forty-nine percent of the performance of the contract takes place outside of Montgomery County. Even more significantly, the ordinance applies to a contract fortuitously signed in Montgomery County, by parties who reside outside of Montgomery County, where none of the performance takes place within Montgomery County. Any contract for services of the type covered by the ordinance, regardless of where in the entire world the contract is to be performed, is regulated by the ordinance if the contract happens to be signed in Montgomery County.
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> *Id*. at 316.

Although it would appear that this fact alone might be sufficient under Article XI-A, § 4 to render the ordinance a general law, the Court did not rest its decision on that fact alone. Instead, as discussed in more detail later, the Court observed that an ordinance that was local in "form" could nevertheless be a general law if it had "substantial" extraterritorial impact. *Id*. at 315. Ultimately, the *Holiday* Court held: "Under our cases, the impact of the ordinance upon persons outside of Montgomery County is **too great** for the ordinance to be a local law under Article IX-A of the Constitution." *Id*. at 317. (emphasis added). Thus, *Holiday* does not support the proposition that an ordinance which on its face has any extraterritorial impact, no matter how slight, will be struck down as a general law.

In responding to the Plaintiffs, the Defendant raises two principal arguments. First, *Holiday* is limited to those bills which contain **express** language extending their reach beyond the geographic boundaries of the county. Bill 36-04 contains no such language. Second, the Defendant insists that the Plaintiffs' arguments apply with equal force to Chapter 27, Human Rights and Civil Liberties, in its present form. If the Plaintiffs are correct, the current Chapter 27 is as well unconstitutional. Rejecting such a suggestion, they note that the Court of

Appeals in *Montgomery Citizens League v. Greenhalgh*, 253 Md. 151 (1969) and *McCrory Corp. v. Fowler*, 319 Md. 12 (1990) had the opportunity to declare the precursor to Chapter 27 unconstitutional because of its extraterritorial reach and declined to do so. In light of that fact, the County submits that the Court of Appeals has already rejected Plaintiffs' argument.

The Court finds the County's position flawed in a number of respects. First, just as the Plaintiffs read *Holiday* too broadly, the County reads it too narrowly. As noted above, clearly the "form" of the Bill, the fact that it expressly applied to acts outside the county, was a significant factor in the Court's decision. However, they also stated "… one must look beyond the form of the ordinance to its substance; 'some statutes, local in form,' are 'general laws, since they affect the interest of the whole state.' " *Holiday*, at 315 (internal citations omitted). Following that statement, the Court reviewed a number of cases where the enactments "appeared to be local in character" but "were held to be general, and not local, laws because of their impact on persons throughout the State." *Id*. at 317.

In *Gaither v. Jackson*, 147 Md. 655 (1925), pursuant to the authority granted them under the recently passed Home Rule Amendment, Baltimore City passed an ordinance licensing auctioneers operating in the City. The ordinance repealed a prior law which granted that power to the governor and made the license fees payable to the State. Baltimore's police commissioner, Gaither, refused to enforce the new law having been advised by the Attorney General it was an invalid exercise of power by the City. Baltimore's mayor, Jackson, sought a writ of mandamus to force Gaither to enforce the law. It was "conceded that, so far as the area of its applicability is concerned," the act came within the definition of a "local law." *Id*. at 666. Nevertheless, the court held "a law is not necessarily a local law merely because its operation is confined to Baltimore City or to a single county, if it affects the interest of the

people of the whole State." *Id*. at 667. They further held that because the law repealed an act that "… provided revenue to the whole State," it affected people outside of Baltimore and therefore was a general law. *Id*.

In another case cited by the Court, *Dasch v. Jackson*, 170 Md. 251 (1936), a paperhanger, Jackson, sought to enjoin enforcement of an act of the State legislature imposing a licensing fee on paperhangers in Baltimore. On its face, it applied only to "… persons engaged in, or desiring to engage in, business of paperhanging in Baltimore." *Id*. at 253, 254. Among other arguments, Jackson asserted that the act was a "local law" and pursuant to the Home Rule Amendment, the State had been divested of its authority to enact such laws affecting Baltimore. It was undisputed that the law on its face fell within the Article XI-A §4 definition of a "local law". Notwithstanding that fact, the Court of Appeals observed that:

> A law may be local in the sense that it operates only within a limited area, but general insofar as it affects the rights of persons without the area to carry on a business or to do work incident to a trade, profession or other calling within the area. It may also be general in the sense that it affects some matter in which the people of the whole legislative jurisdiction may be interested, such as the general revenue, but local in the sense that it imposes burdens on property, business, or transactions only within a limited area.
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> *Id*. at 260.

For both reasons, the Court found the act in *Dasch* was a general law. It raised revenues payable to the State's general fund and therefore affected the people of the whole State. As well, it affected the right of people not residing in Baltimore to engage in the business of paperhanging in the city. Because the State legislature retained its authority to enact the law, Jackson's petition was properly denied.

In *Norris v. Baltimore*, 172 Md. 667 (1937), the Court struck down an ordinance which required the use of certain voting machines in the City of Baltimore. The Court found the ordinance was not a local law despite the fact it applied only within the City of Baltimore stating:

> "… a 'public local law' is a statute dealing with some matter of governmental administration peculiarly local in character, in which persons outside of that locality have no direct interest, and a 'public general law' is one which deals with a subject in which all of the citizens of the State are interested alike, …."
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> *Id*. at 681.

While the ordinance covered only voting in Baltimore, the persons elected and the laws passed with those votes affected all citizens of the State. Accordingly, the Court found that the ordinance was a general law.

Although not involving the Home Rule Amendment, the *Holiday* Court also referenced *Bradshaw v. Langford*, 73 Md. 428 (1891). There, the Court noted that the Maryland Constitution vested the power to enact laws in the Legislature. "[The] power once delegated cannot be redelegated to the people themselves." *Id*. at 430. By Common Law, however, this principle was subject to certain exceptions. It was well recognized that the legislature had the authority to delegate to a municipal corporation, or even the voters within a municipality, the power to accept or reject laws relating to local matters. The Court, however, held this authority did not permit the legislature to confer power on the citizens of Somerset County to decide if gathering oysters by scoop or dredge in their waters could be prohibited. Such an act could not be a local law because it could deprive the citizens of the entire State of a right that they had previously enjoyed. The Court reasoned that it was contrary to sound legislative policy to hold that State legislators could entrust the citizens of one or even a few

counties with the power to determine the rights of the people of the entire State. Such would be an improper delegation of power.

The *Holiday* Court cited each of these cases as an example of an ordinance that appeared local in form, but was general in character. After reviewing them, the Court observed "The same is true of the Montgomery County ordinance at issue in this case. It could have a major impact on services performed for people in the rest of the State…." *Id*. at 317. While the impact may be most apparent where the ordinance contains express language evidencing its extraterritorial reach, *Holiday* and the cases cited therein make clear such express language is not a prerequisite to finding the law a general law.

As a corollary to their argument that *Holiday* is limited to laws that are general on their face, Defendant suggests that if there is any uncertainty about the reach of the ordinance, "under the rules of statutory construction, the court must read a local law, if possible, as having local effect." (Defendant's Motion for Summary Judgment, p. 30).

This issue was addressed by the Court of Special Appeals in *Broadcast Equities v. Montgomery Co.*, 123 Md. App. 363, *rev'd on other grounds and vacated*, 360 Md. 438 (2000). There, the Court observed "Whenever possible, we construe an ordinance to avoid a constitutional conflict. Moreover, we look at the challenged provision in light of the entire statutory scheme and the purpose behind each section." *Id*. at 388. (internal citations omitted). In that case, Broadcast Equities, Inc. (BEI) argued that Chapter 27, § 18(b) of the Montgomery County Code which defined "Employer" to include any person "… who recruits individuals within the county to apply for employment within the county or elsewhere," made the County Code provisions prohibiting discrimination in employment (Ch. 27, §§ 17-26)

applicable to employers outside the county for violations occurring outside the county. In rejecting that interpretation, the Court stated that § 18(b) must be read in conjunction with § 19(a) covering the proscribed conduct. When the two sections are read together, the Court concluded the ordinance only covered discriminatory conduct occurring in the county. The Court's decision was based largely upon the language limiting the definition of "Employer" to persons having significant contact with the county, either employing or recruiting employees within the county.[6] No similar limiting language is found in the ordinance now before the Court. Unlike "Employer" in Chapter 27 § 18(b), "Person" is defined in Chapter 27 § 6 without reference to any geographical limitation.

The County also suggests that the reference to "community" in § 1 of Chapter 27 somehow limits its application to Montgomery County. However, Chapter 27-1 is simply a statement of policy. The Council finds that discrimination without limitation as to where it might occur "…adversely affects the health, welfare, peace and safety of the community." In no way can that finding be reasonably read to limit the application of the ordinance to Montgomery County. It cannot be seriously contended that Montgomery County is harmed less if the decision to discriminate against one of its citizens is made in a county other than Montgomery. Particularly when it comes to lending practices, the "health, welfare, peace and safety of the community" are affected when a county's citizens are victims of discrimination regardless of where the decision to discriminate takes place.

To interpret this ordinance as somehow limited to acts occurring within Montgomery County would require the Court to ignore the very nature of the mortgage loan business. The Court can and will take notice that the mortgage loan industry is a national, if not

[6] The present version of Chapter 27 contains similar limiting language in the definition of "Employer". Chapter 27 § 6. The only difference is that the definition has been expanded to cover persons who employ "one or more" individuals within the County versus "more than six (6) employees" under the then existing ordinance.

international, business. It is beyond dispute and a matter of common knowledge that mortgage loans are often provided by persons or organizations far removed from the location where the loan is placed. The days of a borrower being limited to the local bank or local savings and loan as the source for such loans are long gone.

Prior to the time that the loan documents are finally signed, it is entirely possible, if not probable, that the borrower and lender have never met. Lenders typically act through brokers. As the evidence demonstrates, brokers operate statewide across county boundaries. Finally, the ultimate source of funds for many of these loans nowadays is Wall Street. Loans are securitized and sold as investments. The investment companies that decide which loans they will accept for resale and which they won't have no contact with the borrower or Montgomery County. Yet, because they ultimately decide which loans they will purchase, they exert great influence over the terms that a lender will offer to a borrower. Given the nature of this industry, there is no way that Chapter 27, §§ 12 thru 15 as amended, can be reasonably read to apply only to discriminatory acts occurring in Montgomery County. In reality, while the effects will be felt in Montgomery County, the decision to lend or not and, if so, on what terms will be made elsewhere.

The Defendant's second main argument is that the logical extension of the Plaintiffs' position is that the existing Chapter 27 § 12-15 must be struck down as a general law. Citing *Montgomery Citizens League v. Greenhalgh*, 253 Md. 151 (1969), the Defendant argues that such a notion is absurd because the Court of Appeals has "…unequivocally acknowledged that the enactment of such laws is a permissible exercise …" of the County's authority under Article XI-A. (Montgomery County's Motion for Summary Judgment, p. 26). The argument,

however, ignores the fact that *Greenhalgh* did not involve a discussion of whether the County's Fair Housing Act was a local law.

In *Greenhalgh*, the Court was asked to decide whether the authority delegated to the counties under the Express Powers Act, Maryland Code Art. 25A (1957) encompassed the power to enact fair housing laws. Under Article 25A, § 5(S), the charter counties were granted the right to pass such laws, not inconsistent with the other laws of the State, "… as may be deemed expedient in maintaining the peace, good government, health and welfare of the County." The Court reasoned that to give effect to the intent of the legislature, § 5(S) should be read as a "broad grant of power to legislate on matters not specifically enumerated in Article 25A …." *Id*. at 151, 161. Such a grant is commonly referred to as "a general welfare or general grant of power clause." *Id*. (internal citations omitted) Noting that generally charter counties are viewed as having the broadest grant of powers, the Court held:

> "A fair housing or equal accommodation law currently must prima facie be regarded as a reasonable exercise in good faith of the police power to protect the peace and good order of the community and to promote its welfare and good government."
>
> *Id*. at 162.

Although upholding the law, as within the power of the counties to enact, the court expressly noted no challenge has been made to specific provisions of the Bill and there was "no need to rule on any of its particular provisions". *Id*. at 165.

The Defendant also cites to *McCrory Corp. v. Fowler*, 319 Md. 12 (1990), as support for its argument that the Court of Appeals has tacitly acknowledged that Montgomery County's fair housing laws are a proper exercise of the County's authority. There, the Court of Appeals held that Montgomery County Code, § 27-20(a), creating a private cause of action for employment discrimination, was not preempted by Article 49B of the Maryland Code.

However, the Court went on to hold the ordinance was a general law because it concerned a matter "… of significant interest to the entire State, calling for uniform application in state courts" and therefore was unconstitutional. *Id*. at 21.

In *McCrory*, an employee, Fowler, brought a discrimination claim against the McCrory Corporation. The corporation moved to dismiss the action, alleging that Montgomery County Code § 27-20 was invalid because the County Council exceeded its authority under Article 25A. Fowler, citing *Greenhalgh*, argued that the Court must construe the Express Powers Act, specifically § 5(S), as the broadest grant of power. The Court observed that even though § 5(S) must be construed broadly, the legislature cannot in any event authorize a county to enact a general law in violation of Article XI-A.

The *McCrory* Court distinguished *Greenhalgh* noting that the ordinance in *Greenhalgh* did not attempt to create a new private judicial cause of action. While some ordinances creating limited judicial causes of action had been upheld, the cause of action created by Montgomery County in *McCrory* permitted claims for injunctive relief and unlimited damages.

Fowler argued that the Attorney General of Maryland had issued an Opinion that a charter home rule county has authority to specify a private right of action as a remedy for a violation of county law. In addressing that argument, the Court noted that the private right of action addressed in the Opinion was by an owner for a vehicle that had been improperly towed or damaged. Further, the allowable damages were limited to three times the amount of any fees charged. They also observed that the Attorney General in issuing the Opinion relied upon two cases, one from Oregon, *Papen v. Karpow*, 55 Or. App. 673, 643 P.2d 375 (1982), and one from Colorado, *Bittle v. Brunetti*, 750 P.2d 49 (Co. 1988). Both cases involved

private causes of action for damages arising out of snow removal ordinances brought by one neighbor against the other. In distinguishing the cases, the Court noted "Snow removal and towing ordinances, unlike employment discrimination ordinances, deal with subject matters of a peculiarly local nature. Moreover, a primary purpose of a snow removal ordinances (sic) is to aid a municipal corporation in carrying out one of its own legal duties." *McCrory*, at 24. (citations omitted).

The Court recognized that in the area of employment discrimination "the field has not been preempted by the State, and that home rule counties have concurrent authority to provide administrative remedies not in conflict with the state law." *Id*. at 20. However, creating a remedy typically reserved to the legislature or the courts "goes beyond a 'matter [ ] of purely local concern'." *Id*. (internal citations omitted). By enacting an ordinance which permitted claims for unlimited money damages and injunctive relief, the County had exceeded their authority by attempting to enact a general law. That they could not do.

The Court also distinguished *County Council v. Investors Funding*, 270 Md. 403 (1973), relied upon by Fowler, noting that "the county ordinance upheld in that case provided enforcement remedies of a much more limited nature than the cause of action created by 27-20(a) of the Montgomery County Code." *McCrory*, at 22.

Here, the County Council increased the damages that a person may seek for a violation of the ordinance a hundredfold. They did so even against the advice of the attorneys for the County. Instead of a maximum of $5,000, a person claiming under the ordinance may now seek damages for "humiliation and embarrassment" of up to $500,000. In addition, the Council added a new category of compensable damage, "financial loss."

The allowable damages for "humiliation and embarrassment" under the Bill approach the maximum allowed in a civil action brought in a circuit court for non-economic damages, $680,000. Courts and Judicial Proceedings Article § 11-108 Maryland Code. Additionally, the administrative remedy provided under the Bill will almost certainly cause greater concern for citizens accused of wrongdoing because it will expose them to damages similar to those available in a judicial action without affording them many of the traditional rights and protections of a trial, including the right to a jury trial.[7]

Although not binding because it was reversed on other grounds, Plaintiffs also cite the Court to *Beretta USA Corp. v. Santos*, 122 Md. App. 168 (1998), vacated *sub nom*, 358 Md. 166 (2000). Rather than attempt to distinguish *Beretta*, the Defendant simply argues that it was wrongly decided. Although not binding, the reasoning of the Court in that case is instructive and persuasive.

In *Beretta*, the corporation appealed from a decision by the Prince George's County Human Relations Commission awarding a former employee, Santos, damages including lost wages and $20,000 for embarrassment and humiliation. The employee filed his complaint for employment discrimination pursuant to Prince George's County Code § 2-195.01. In seeking to reverse the Commission's decision, Beretta asserted that the ordinance was unconstitutional because it was preempted by State law and was not a "local law".

Citing *McCrory* and *Investors Funding*, the Court of Special Appeals agreed and held that the ordinance was unconstitutional. Initially, the Court found that the ordinance was unconstitutional because it was preempted by State law. Unlike § 2-195.01, the monetary relief available to an employee under State law was limited to three years of back pay.

[7] While not specifically addressing the issue, the Court in *Beretta v. Santos*, 122 Md. App. 168, 193, fn. 7, vacated *sub nom*, 358 Md. 166 (2000) highlighted a concern about whether compensatory damages can be awarded at an administrative level if the employer is not entitled to a jury trial to contest the award.

Awards for humiliation and embarrassment were not permitted. Md. Code Art. 49B, § 11e. Awards available under the county ordinance exceeded those available under state law in both amount and kind. Therefore, the county ordinance was preempted by conflict.

The *Beretta* Court next considered whether the ordinance was invalid as a general law. The ordinance, Prince George's County Code, § 2-195.01 (a)(3), authorized the Commission to award up to $100,000 in damages for humiliation and embarrassment which "are not readily quantifiable." *Id*. The Court found that the holding of the Court of Appeals in *McCrory* and *Investors Funding* that "… a county agency may be vested with the authority to award damages for pecuniary loss resulting from discrimination," is limited by the qualifier, "when such damages are reasonably quantifiable and relate to identifiable, actual losses." *Beretta*, at 199.

The Court ultimately concluded:

> "[I]n our view, whether an administrative agency is authorized to award damages for humiliation and embarrassment for employment discrimination pertains to a matter of statewide concern and, therefore, is within the province of the Legislature. Therefore, we hold that an ordinance that authorizes administrative damages for humiliation and embarrassment as a result of employment discrimination is not a 'local law' under Article XI-A of the Maryland Constitution, and thus is not within the power of Prince George's County to enact."
>
> *Id*. at 200.

In arriving at this conclusion, the Court noted that the issue of whether damages may be awarded administratively for employment discrimination has been an issue of some debate in the General Assembly. *Id*.

Applying the *Beretta* Court's logic to the instant case leads inevitably to the conclusion that Bill 36-04 is not a local law. As amended, Chapter 27 §§ 8, 12 through 15,

would permit the Montgomery County Commission on Human Rights in its discretion to award damages for humiliation and embarrassment of up to $500,000. The question of whether the Commission, an administrative agency, should have such broad authority is certainly a matter of significant concern to the citizens of the entire State and therefore within the sole province of the Legislature.

SEVERABILITY

The County argues that assuming certain provisions of Bill 36-04 are unconstitutional, the Court must sever those offending provisions and preserve the balance of the Bill. The Plaintiffs argue that the provisions which render the Bill invalid go to its very heart. Therefore, no part of the Bill can be saved.

The Court finds the Plaintiffs are correct. If the only offending provision was the section relating to damages, the Court would agree that that section could be severed and the remaining portions of the Bill saved. However, the Court has also found that by extending the reach of the Bill to all persons, without regard to where they may live or conduct business, the Council enacted a general law. Therefore, the Court holds that the offending sections go to the very heart of the legislation and cannot be severed.

CONCLUSION

Under the Maryland Constitution, the power to enact laws is vested principally in the State Legislature. Charter Home Rule counties, like Montgomery County, are granted limited rights of self determination, including the authority to enact "local" laws. No matter how noble the purpose, a "general" law is beyond the authority of the county to enact and is

unconstitutional. The ordinance now before the Court, Bill 36-04, is such a law. As drawn, it has substantial territorial effect beyond the borders of Montgomery County. It concerns matters that are of significant interest to the citizens of the entire State. It affords injunctive relief and non-economic damages of up to $500,000, remedies traditionally reserved to the Legislature and the courts to create. For all these reasons, Bill 36-04 is not a local law and is therefore unconstitutional. Accordingly, it shall be declared null and void, and the County shall be permanently enjoined from enforcing it.

/s/ 11/30/2006
MICHAEL D. MASON, JUDGE
Circuit Court for Montgomery County, MD.